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April 15, 1986

The ("Company") is in the business of renting and selling construction equipment to construction contractors. One of the Company's customers ("Contractor") rents three types of equipment from the Company, namely scaffolding, "sky climbers" and power lifts. You state that the Contractor uses this equipment in the construction, remodeling or repair of real estate pursuant to construction contracts with the ("Utility"). The Utility has a direct payment permit for the payment of sales tax.

You ask two questions. One is whether the Contractor may use the Utility's direct payment permit to pay directly any sales tax due on the Contractor's rental of construction equipment from the Company for use in its work for the Utility. We conclude that the Contractor may not use any direct payment permit for the rental of construction equipment from the Company.

The sales tax is imposed upon retail sales of tangible personal property in Massachusetts. G.L. c. 64H, § 2. The term "sale" includes a lease. G.L. c. 64H, § 1(12)(a). Retail sales are sales of tangible personal property for any purpose other than resale in the regular course of business. G.L. c. 64H, § 1(13).

General Laws Chapter 64H, Section 3(b) states the rules for direct payment permits. This section states that a direct payment permit may be used only by the permit holder, and that it may not be used in connection with the construction, remodeling or repair of real estate. G.L. c. 64H, § 3(b). Since the Contractor is not a permit holder, and since the property is leased by the Contractor in connection with the construction, remodeling or repair of real estate, the Contractor may not use the Utility's, or any other, direct payment permit to pay directly any sales tax due on the lease of such property.

The second question you ask is whether the Company must collect and pay over sales tax on the Contractor's rentals of equipment, or whether the Company may accept a resale certificate from the contractor in lieu of sales tax.

Contractors must adhere to the following guidelines in paying sales tax or giving resale certificates on their purchases. A contractor who purchases materials from a retailer for use in building construction is generally considered the consumer of the materials and not a purchaser for resale for sales and use tax purposes. Seltzer and Co., Inc. v. State Tax Commission, ATB Docket Nos. 68886, 68887 (1975), aff'd sub nom. Ace Heating Service, Inc. v. State Tax Commission, 371 Mass. 254 (1976); Letter Ruling 84-85. Thus a contractor must pay the sales tax as a consumer upon the purchase of all materials or supplies used by it in fulfilling a lump-sum contract, a cost-plus contract, or a time and material contract with an upset or guaranteed price which may not be exceeded.

However, in two situations a contractor would be considered a vendor and therefore would be able to give its vendor a properly executed resale certificate:

- (a) where a contractor contracts to sell materials or supplies at an agreed price and to render service in connection therewith, either for an additional agreed price or on the basis of time consumed; and
- (b) where a contractor is actually engaged as a vendor in the business of selling or renting such materials or supplies at retail.

In the case of (a) or (b), a contractor must collect the sales tax due from the person to whom the contractor resells or rerents the materials and supplies and pay it over to the Commonwealth. G.L. c. 64H, §§ 2, 3(a).

The following rules summarize the Company's tax obligations. All gross receipts of a vendor are presumed to be from taxable sales. G.L. c. 64H, § 8(a). The vendor of tangible personal property has the burden of proving that any part of its gross receipts are not from sales subject to tax. G.L. c. 64H, § 8(a). If the vendor accepts in good faith a properly executed resale certificate from a purchaser who is engaged in the business of selling tangible personal property, who is registered as a vendor for sales tax purposes, and who, at the time of purchasing the tangible personal property, intends to resell or rerent it in the regular course of business or is unable to ascertain at the time of purchase whether the property will be resold or rerented or will be used for some other purpose, the certificate will relieve the vendor

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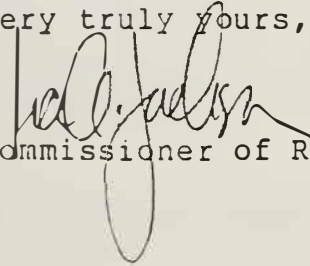
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of its burden of proof. G.L. c. 64H, §§ 1(12)(a), 7, 8(a), (b), (c). The "good faith" requirement means that the vendor must have no reason to believe that the contractor purchased the property from the vendor for any purpose other than resale or rental in the regular course of business. Cf., Letter Ruling 83-34.

A properly executed resale certificate is signed by the purchaser, bears the purchaser's name, address and registration number, and indicates the general character of the property which is sold or rented by the purchaser in the regular course of business. G.L. c. 64H, §§ 1(12)(a), 8(a). Thus, if the Company, as vendor of the construction equipment, accepts a properly executed resale certificate from the Contractor in lieu of sales tax, under the circumstances outlined in Section 8 of Chapter 64H, set forth above, and the Company has no reason to believe that the Contractor is purchasing the equipment for any purpose other than resale or rental in the regular course of business, the Company's gross receipts from such sale are not subject to tax.

The law provides that where a purchaser, who gives a resale certificate in lieu of paying sales tax on its purchase, makes any use of the property purchased, other than retention, demonstration or display while holding it for resale or rental in the regular course of business, the use of the property is considered a retail sale by the purchaser as of the time the property is first used by him, and the purchaser would be liable for sales tax on his cost. G.L. c. 64H, § 8(d). Thus, a contractor which gives the Company a resale certificate and makes any use of the property other than retention, demonstration or display while holding it for rental in the regular course of business, is obligated to pay sales tax on the cost of the property to the contractor.

Very truly yours,

  
Commissioner of Revenue

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